IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 6

WILLIAM L. GRIFFIN, MARVOUS SAUNDERS, MICHAEL PROCTOR, CECIL T. WASHINGTON, JR., AND GWENDOLYNE GREENE,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Maryland is fully set out on pages 22 through 29 of the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "A") and is now reported in the Advance Sheets, 225 Md. 422 and 171 A. 2d 717.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on June 8, 1961. The Respondent denies that 28 U.S.C.A. Section 1257(3) or Revised Rule 19 of this Honorable Court provides jurisdiction for consideration of the instant Petition for Writ of Certiorari.

QUESTION PRESENTED

The Respondent accepts the substance of the Petitioners' question but submits that it should be rephrased, to delete characterizations and conclusions, as follows:

May the State of Maryland, under a general statute prohibiting trespass on private property and on the complaint of the owner of a privately-owned and operated amusement park, convict persons who picket and enter upon such amusement park and who, after demand by the agent of the owner, refuse to leave such amusement park?

STATEMENT

This is a Petition for Writ of Certiorari to review the judgment of the Court of Appeals of Maryland affirming the conviction of the Petitioners for violation of the general statute prohibiting trespass on private property.

The Court of Appeals affirmed the conviction of these five Petitioners and reversed the conviction of five other persons in a companion case. The Court of Appeals distinguished between the two cases on the basis that these Petitioners had been duly notified by the agent of the owner to leave the private amusement park, whereas in the companion case the authority of the guard giving the notice was not established. Although the same guard gave the notice in both cases, the evidence in the companion case did not clearly establish that the guard was acting

on behalf of the concessionaire who operated the restaurant in the amusement park.

These Petitioners were a part of a group of about forty people who left the District of Columbia and entered the State of Maryland on June 30, 1960. The group proceeded to the area of the privately-owned amusement park for the purpose of protesting the park's known policy of admitting to the premises and providing service to white people only. See Appendix hereto (hereinafter referred to as "Apx."), pages 4 and 5. The group, including these five Petitioners, staged a picket line for an hour near the entrance to the amusement park, displaying prepared signs and placards which protested racial segregation (Apx. 5). After surreptitiously receiving tickets for amusements within the park (Apx. 4, 5), these five Petitioners left the picket line and entered the private property of the amusement park, placed themselves upon the carousel and refused to leave the premises when requested to do so by the park's agent (Apx. 2).

The park's agent at the time was Lieutenant Collins, who was an employee of the National Detective Agency, a private organization authorized to provide guard service to its clients. Under the State law such guards do not have police power. The public local laws authorized the particular county to deputize agents of the owners of private property and businesses for the purpose of permitting them to obtain police protection without cost to the taxpayers generally. Such special deputies are restricted in their authority to the premises of the applicant and do not have the county-wide authority of a regular deputy sheriff. Lieutenant Collins had been assigned under the guard contract between the National Detective Agency and the amusement park to be the senior guard with the title of lieutenant.

Lieutenant Collins wore the uniform of the National Detective Agency, his employer, and as guard on the private amusement park property, he was to execute the orders of the owner and operator as its agent. Under the instructions of the owner and operator, he arrested the Petitioners because they were trespassers (Apx. 3). The trespass incident caused a milling crowd to become disorderly (Apx. 2, 5).

In the companion case, which was reversed by the Court of Appeals of Maryland, two of the arrestees were white.

This is one of several actions, involving claims of civil rights against private property, which have been developed through the criminal and appellate courts of the states to be pressed upon the attention of this Honorable Court. Compare Respondent's *Motion to Dismiss or Affirm* in *Dale H. Drews v. State of Maryland*, No. 71, October Term, 1961.

ARGUMENT

This Petition Does Not Present Any Unique Factual Situation Nor Any Legal Proposition Which Has Not Been Fairly Included in Cases Recently Before This Honorable Court.

The proposition tendered by the Petitioners is essentially the same as the one presented originally in *Boynton v. Virginia*, 364 U.S. 454. The Petitioners in the *Boynton* case and the Solicitor General, by a brief *amicus curiae*, urged this Honorable Court to consider the same proposition which is again being tendered by these Petitioners, but this Honorable Court, in its wisdom, decided the case on another basis. Undoubtedly, this Honorable Court was following the concept contained in the last sentence in the recent dissent by Mr. Justice Harlan in *Burton v. Wilmington Parking Authority*, 365 U.S. 715.

> "It seems to me both unnecessary and unwise to reach issues of such broad constitutional significance as those now decided by the Court, before the necessity for deciding them has become apparent."

Evidently, counsel for the Petitioners is not satisfied with the position taken by this Honorable Court in the *Boynton* case, since he quotes and urges again the arguments of the Solicitor General which this Honorable Court had previously considered and rejected.

The Petitioners refer to other applications for certiorari currently pending before this Honorable Court from Virginia, North Carolina and Louisiana. This curious condition tends to indicate that there is a concerted determination that this Honorable Court must continually be presented for decision each term the fringe questions in the field of civil rights and be vigorously pressed forward each year into new areas even prematurely. There has been no lack of opportunity in the last several years for this Honorable Court, if it had seen fit, to consider the question urged by the Petitioners. Compare *Wolfe v. North Carolina*, 364 U.S. 177; *Boynton v. United States*, 364 U.S. 454, *supra*; and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, *supra*. The sudden appearance of many criminal cases involving claims of discrimination in the last several years is not consistent with normal coincidence. Compare *United States v. United Mine Workers of America*, 330 U.S. 258. It is pertinent to observe the comment of the trial Judge below in his oral opinion (A. 20):

> "Why they didn't file a civil suit and test out the right of the Glen Echo Amusement Park Company to follow that policy is very difficult for this Court to understand, yet they chose to expose themselves to possible harm; to possible riots and to a breach of the peace."

To grant certiorari to these Petitioners, and perhaps to the petitioners in the other cases referred to by these Petitioners, is to encourage public violence and the use of the criminal law rather than the civil law for the location and determination of the extent of particular civil rights. The civil law should not be evolved in the criminal courts of the nation, and the creation of artificial crises should not be encouraged.

The Petitioners, in order to supply an air of uniqueness to their position, have somewhat distorted the evidence in the case in the trial court. The Petitioners continually refer to the private detective agency guard as "Deputy Sheriff Collins", whereas everyone in the trial court recognized his true status by referring to him as "Lieutenant". There is *nothing* in the record to support the assertion that Collins was hired by the amusement park for the *sole* purpose of excluding Negroes. The usual reason an owner or businessman engages uniformed guards is to maintain peace and to protect property from damage or theft. There is nothing in the record to indicate that Collins was hired for any other reason.

The Petitioners have conveniently overlooked the fact that the Court of Appeals reversed the companion case against *Greene* and others where the same guard gave the same instruction to leave the restaurant in the amusement park but where there was a failure in the record to clearly establish that Collins had the concessionaire's authority as private owner to give such a notice. The opinion of the Court of Appeals clearly indicates that Collins was not executing any State authority by virtue of his special deputy sheriff's commission but was acting solely as the agent of the private property owner in directing the Petitioners to leave the private amusement park premises. It will be noted that although Lieutenant Collins arrested

the Petitioners, nevertheless he went through the same procedure as any ordinary citizen in obtaining an arrest warrant from a justice of the peace for Montgomery County directed to the county superintendent of police (Record Extract, page 11).

It is difficult to reconcile the characterization that the private amusement park was open to the general public with the fact that these Petitioners admittedly believed the park to be restricted to white people, actually protested the supposed segregation policy by picketing prior to entry, surreptitiously obtained carousel tickets through white people and concede in their instant petition that the amusement park "has traditionally been patronized by white customers" on page 3.

The thrust of the Petitioners' argument is that the right of the owner of a private business to determine who his customers will be is lost whenever this discretion is based on his disinclination to serve a particular racial group and that the ordinary trespass law, which insures peaceful possession, is nugatory when the owner's motivation is based on race. The Petitioners seek to strip the private property owner of his right to determine his invitees and to relegate such owner to violent self-help, when the members of a race with whom he is not inclined to do business take the law into their own hands and trespass on his private property. Although the Petitioners have taken liberties with the record and have enjoyed excursions into the hearsay of newspapers, which were not admitted into evidence below, to theorize on the impact which the destruction of long-established private property law concepts might produce, nevertheless, the Petitioners have not indicated whether they should be entitled to have the State defend them while trespassing if the private owner should resort to violent self-help. A petition for a writ

of certiorari should be addressed to the law as it is and not to speculative theorizing as to what the law could be based on hearsay.

The Petitioners were not satisfied to raise their legal theories concerning the rights of a private property owner by a deliberative civil proceeding but took the law into their own hands and forced the issue into the criminal courts. The Petitioners refer to their trespass as *peaceable* but it is difficult to reconcile an invasion of another's private property against his known wish with the use of that word.

The Petitioners have referred to other cases which this Honorable Court has considered. In pertinent cases there has been a public ownership element. It was either a public school, a public recreational facility or a publicly-owned utility. The taxpayers, through the State or municipality, either owned or operated it or they profited from a lessee thereof. The public ownership element has been present in every case, from *Brown v. Board of Education of Topeka*, 344 U.S. 1 and 347 U.S. 483 to and including *Burton v. Wilmington Parking Authority*, 365 U.S. 715, *supra*. In the only case which involved private ownership this Honorable Court decided to consider the matter from a federal statutory aspect. *Boynton v. Virginia*, 364 U.S. 454, *supra*.

The common law has been well settled that the owner or operator of a private enterprise has the right to select his clientele and to make such selection based on color if he so desires. A few of the noteworthy case are: *Madden v. Queens County Jockey Club*, 72 N.E. 2d 697, 698 (New York); *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W. 2d 824, 825 (Texas); *Younger v. Judah*, 19 S.W. 1109, 1111 (Missouri); *Goff v. Savage*, 210 P. 374 (Washington);

De La Ysla v. Publix Theatres Corporation, 26 P. 2d 818, 820 (Utah); *Horn v. Illinois Central Railroad*, 64 N.E. 2d 574, 578 (Illinois); *Coleman v. Middlestaff*, 305 P. 2d 1020, 1022 (California); *Fletcher v. Coney Island*, 136 N.E. 2d 344, 350 (Ohio); *Alpaugh v. Wolverton*, 36 S.E. 2d 906, 908 (Virginia); *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 102; *Good Citizens Assoc. v. Board*, 217 Md. 129, 131; *Drews v. State*, 224 Md. 186, 191, 193, 194; *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 127; and *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Circuit).

This Court has used language consistent in *Terminal Taxicab Co. v. Kutz*; 241 U.S. 252, 256, and *Boynton v. Virginia*, 364 U.S. 454, *supra*, where it stated that:

> "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provision of that Act."

The Petitioners are in the anomalous position of recognizing that the Congress of the United States cannot enact a federal equal rights statute under the Fourteenth Amendment (Civil Rights Cases, 109 U.S. 3), nevertheless asserting that this Honorable Court by judicial decision can accomplish the same result by now holding that the same Fourteenth Amendment created a new limitation on the use of private property as developed in the common law. For this proposition the Petitioners cite no authority.

CONCLUSION

The Petitioners' essential proposition is that a person cannot be convicted of trespass if the private owner's exclusion is based on racial discrimination. This same proposition was presented and urged by the Solicitor General

in the *Boynton* case, but this Honorable Court declined to decide the *Boynton* case on that issue. The same proposition has been available to the Court in several other recent cases. There is nothing new or unique about the Petitioners' proposition. This petition is addressed to a desire for legislative relief rather than support in existing law and is another phase of the concerted action to press for an immediate determination of a new front in the civil rights crusade.

The contention that violent self-help is the only remedy available to a private property owner or that the aggressive trespasser alone can receive State aid to preserve his asserted right presents little logic to a jurisprudence based on reconciling conflicting rights and developing peaceful remedies.

This petition for a writ of certiorari is premature, as an abstract proposition and this Honorable Court has consistently recognized that the essence of this complaint does not involve a substantial federal question. This petition should be denied.

Respectfully submitted,

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APPENDIX TO BRIEF IN OPPOSITION NO. 287

September 12, 1960

Vol. 1

(Transcript of testimony 6-7):

FRANCIS J. COLLINS, a witness of lawful age, called for examination by counsel for the plaintiff, and having first been duly sworn, according to law, was examined and testified as follows, upon

DIRECT EXAMINATION

By Mr. McAuliffe:

* * * * * *

(T. 18):

Q. During the five minute period that you testified to after you warned each of the five defendants to leave the park premises, what, if anything, did you do? A. I went to each defendant and told them that the time was up and that they were under arrest for trespassing. I then escorted them up to our office, with a crowd milling around there, to wait for transportation from the Montgomery County Police, to take them to Bethesda to swear out the warrants.

* * * * * *

(T. 21):

CROSS EXAMINATION

By Mr. Duncan:

* * * * * *

(T. 38-39):

Q. Lets take Mr. Washington, here on the end. Tell me the conversation you had with him at the time you arrested him and what he said to you. A. As far as I recall there was no conversation between any of us, only I told them

about the policy of the park and they answered me that they weren't going to leave the park.

* * * * * *

(T. 42):

REDIRECT EXAMINATION

By Mr. McAuliffe:

* * * * * *

(T. 48-49):

By Judge Pugh:

Q. Did these defendants have any other people with them? A. There was a large crowd around them from the carousel up to the office.

Mr. McAuliffe continues:

Q. And prior to the arrest, during this five minute interval that you gave them as a warning period, was there a crowd gathering at that time? A. Yes, sir.

Q. And what was the condition, or orderliness, of that crowd as it gathered there?

(Mr. Duncan) I object to that question, your Honor. Mr. Collins has testified that he arrested these persons for no other reason than that they were negroes, and gave them five minutes to get off the property.

Q. (Judge Pugh) Was there any disorder? A. It started a disorder because people started to heckling.

* * * * * *

(T. 67):

ABRAM BAKER, a witness of lawful age, called for examination by counsel for the plaintiff, and having first been duly sworn, according to law, was examined and testified, upon

* * * * * *

(T. 76):

CROSS EXAMINATION

By Mr. Duncan:

* * * * * *

(T. 85):

Q. What did you mean when you told Lieutenant Collins to arrest white persons who came into the park property, if they were doing something wrong?

(Mr. McAuliffe) Objection.

(Judge Pugh) Read the question back. (Last question was read by the reporter.) Objection overruled.

A. Well if they were in the picket line and then ran out into the park and we told them to leave and they refused, why shouldn't you arrest them?

* * * * * *

(T. 96):

REDIRECT EXAMINATION

By Mr. McAuliffe:

* * * * * *

(T. 97):

Q. Did you instruct Lieutenant Collins that he was to arrest negroes because they were negroes, or because they were trespassing? A. Because they were trespassing.

* * * * * *

(T. 98):

RECROSS EXAMINATION

By Mr. Duncan:

Q. Did you instruct Lieutenant Collins to arrest any other persons who trespassed, other than negroes? A. I went over that once before with you. I told him if they came out of that picket line to come on to the property, to give them due notice and to arrest them if they didn't leave; white or colored.

* * * * * *

(T. 110):

KAY FREEMAN,

a witness of lawful age, called for examination by counsel for the defendants, and having first been duly sworn, according to law, was examined and testified as follows, upon

DIRECT EXAMINATION

By Mr. Duncan:

* * * * * *

Q. Prior to the time they were arrested, did they have tickets to ride on any of the rides? A. We all had tickets.

Q. Where did you acquire these tickets? A. They were given to us by friends.

Q. White friends? A. Yes.

Q. And they had made the purchase? A. That is right.

* * * * * *

(T. 113):

CROSS EXAMINATION

By Mr. McAuliffe:

* * * * * *

(T. 114-115):

Q. Did you go out with these five defendants? A. Yes.

Q. Did you go out with any others? A. Yes.

Q. How many? A. Thirty-five or forty.

Q. And you all expected to use the facilities there at Glen Echo Park, in accordance with those advertisements? A. I expected to use them.

Q. Did you have any signs with you when you went out there? A. Yes.

Q. What did these signs say? A. They protested the segregation policy that we thought might exist out there.

* * * * * *

Q. Did these five defendants have signs? A. I don't know. I think we all had signs, at one time or another.

* * * * * *

(T. 116):

Q. What did these five defendants do and other persons do? A. We had a picket line.

* * * * * *

Q. Why did you do that if you didn't know the park was segregated? A. Because we thought it was segregated.

* * * * * *

(T. 118):

Q. Now you say after you got on the park property, tickets were given you by some white friends; is that right? A. That is right.

* * * * * *

(T. 120):

Q. Was there a crowd around there? A. Yes.

Q. Did you hear any heckling? A. Yes.

* * * * * *

(T. 123):

Q. How long did you march in this definite circle, with these five defendants, with these signs, protesting the park's segregation policy, before the five defendants and you entered Glen Echo Park? A. I don't know.

Q. Would you give us your best estimate on that, please? A. Maybe an hour or maybe longer.

* * * * * *

(T. 125):

EXAMINATION BY THE COURT

By Judge Pugh:

Q. Was the heckling a loud noise? A. Yes.

Q. How many people were in it? A. I don't know, but the merry-go-round was almost surrounded.

* * * * * *

(T. 126):

Q. Why didn't you go with one or two people, instead of forty? What was the idea of going out there in large numbers? A. There was a possibility that it was segregated.

Q. Well you all anticipated that there would be some trouble; didn't you? A. Yes.

* * * * * *